IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 04-3198

CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS, *ET AL.*,

APPELLANTS,

v.

MIKE HATCH,

APPELLEE.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MINNESOTA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Administrative Decisions

Statutes and Regulations

Others

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AMICUS CURIAE BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF INTEREST

The Federal Communications Commission ("Commission" or "FCC") respectfully files this brief as amicus curiae to advise the Court of the agency's interpretation of 47 U.S.C. § 332(c)(3)(A), the provision of the federal Communications Act that is centrally at issue in this appeal. The Commission has an interest in this case because Congress has assigned to the agency exclusive responsibility for implementing the Act, including section 332, and the state statute

challenged in this case presents a conflict with section 332 and federal communications policy.

Commercial mobile service providers are subject to rate and service regulation by the Commission under section 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A), to the extent that the agency has not exercised its authority to forbear from applying such regulation. Section 332(c)(3)(A), inter alia, prohibits states from regulating the rates charged by commercial mobile service providers. The district court in the proceeding below determined that section 332(c)(3)(A) does not preempt a Minnesota statute limiting the ability of wireless communications common carriers to increase the rates they charge their customers. As we show in this brief, the Commission interprets section 332(c)(3)(A) as preempting the Minnesota statute insofar as the statute regulates the rates for commercial mobile services.[1]

[1] The Commission in this brief addresses only the issue whether section 332(c)(3)(A) preempts Article 5 insofar as it requires a 60-day waiting period and customer consent before wireless service providers may increase their rates. We take no position on, and do not address, other applications of Article 5. It is our understanding that, if the Court were to disagree with appellants' position that Article 5 is entirely preempted on its face, that disposition would not necessarily preclude the Commission from considering, in a later agency proceeding, whether particular applications of Article 5 are preempted.

BACKGROUND

A. Statutory And Regulatory Background

1. Wireless communications use radio frequencies licensed by the FCC. See 47 U.S.C. §§ 301, 303. The Commission initially set aside radio frequencies for the development of wireless telephone service in the mid-1970s. See Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d 842, 845 (2d Cir. 1996); Cellnet Communications, Inc. v. FCC, 149 F.3d 429, 432 (6th Cir 1998). Confronting a growing demand for wireless services and in an effort to allow competition in wireless markets, the Commission in 1981 decided to increase the spectrum allotted to wireless telephone service and to license in each market two competing "facilities-based" wireless carriers – the carriers constructing and owning the underlying physical facilities to provide service. In the early 1990s, the Commission allocated substantial additional radio spectrum and established licensing and allocation rules for a new set of wireless communications services known as personal communications services ("PCS"). See Amendment of the Commission's Rules To Establish New Personal Communications Servs., 8 FCC Rcd 7770 (1993). By creating PCS, the Commission sought to encourage the provision of a broad range of new services and technologies and to further increase wireless competition. 8 FCC Rcd at 770 (¶ 1).

The Communications Act of 1934, 47 U.S.C. §§ 151, et seq., provides the federal framework for the regulation of these wireless services. Until 1993, wireless communications common carrier services, such as cellular telephone service, were subject to the same system of dual state and federal regulation under the Act that applied to traditional wireline telephone services.[2] Section 2(b) of the Act reserved to the states the authority to regulate intrastate common carrier service, and many state commissions required wireless carriers to file tariffs that established the rates, terms and conditions of intrastate wireless service.[3] The interstate rates and services of common carrier wireless service providers were subject to Title II of the Act.[4] Title II imposes a number of specific obligations on common carriers, such as the filing of tariffs with the FCC establishing the rates, terms and conditions of interstate service. 47 U.S.C. § 203.

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[2] See 47 U.S.C. § 152. See generally Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986); Qwest Corp. v. Scott, 380 F.3d 367, 370 (8th Cir. 2004).

[3] 47 U.S.C. § 152(b). See, e.g., In the Matter of Petition on Behalf of the State of Haw., 10 FCC Rcd 7872, 7879-80 (¶¶ 30-38) (1995) (state tariffing of wireless services); In the Matter of Petition on Behalf of the State of Conn., 10 FCC Rcd 7025, 7046 (¶ 43) (1995), aff'd, Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d 842, 845 (2nd Cir. 1996) (same).

[4] Before 1993 wireless services were classified as private land mobile services or public mobile services. Only public mobile services were treated as common carrier services subject to Title II regulation. See Implementation of 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1414 (¶ 3) (1994) ("CMRS Second Report and Order").

As wireless services were becoming more competitive, however, Congress in the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 392, amended the Communications Act "to dramatically revise the regulation of the wireless telecommunications industry."[5] The OBRA amendments created new regulatory categories of wireless service known as commercial mobile radio service ("CMRS") and private mobile radio service ("PMRS"),[6] and changed the framework of wireless services regulation in two significant respects in order to accelerate the development of competition in the wireless marketplace.[7]

First, Congress eliminated the dual federal and state frameworks for rate and entry regulation, establishing instead a uniform "national regulatory policy for CMRS, not a policy that is balkanized state-by-state." In the Matter of Petition on Behalf of the State of Conn., 10 FCC Rcd at 7034 (¶ 14). Section 332(c)(3)(A)

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[5] Cellnet Communications, Inc. v. FCC, 149 F.3d at 433. Accord Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d at 845.

[6] CMRS includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). PMRS is a wireless communications service that is not CMRS or its functional equivalent. 47 U.S.C. § 332(d)(2). The statute uses the terms "commercial mobile service" and "private mobile service"; the Commission's rules substitute the equivalent terms CMRS and PMRS, which for purposes of consistency will be used throughout this brief.

[7] See In the Matter of Petition on Behalf of the State of Haw., 10 FCC Rcd at 7874 (¶ 8).

denies the states "any authority" to "regulate the entry of or the rates charged by" any CMRS or PMRS provider. 47 U.S.C. § 332(c)(3)(A). That same section permits a state to petition the Commission for authority to regulate CMRS rates, which the Commission shall grant if the state demonstrates that "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. § 332(c)(3)(A). See also 47 C.F.R. § 20.13 (regulations governing state petitions for authority to regulate CMRS rates). In the absence of Commission authorization, section 332(c)(3)(A) permits states to regulate only terms and conditions of CMRS services "other" than rates and entry. 47 U.S.C. § 332(c)(3)(A).[8]

Second, OBRA amended the Act to reflect Congress's "general preference in favor of reliance on market forces rather than regulation,"[9] and to permit the emerging CMRS market to develop subject to only the degree of regulation "for which the Commission and the states [can] demonstrate a clear-cut need."[10]

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[8] Consistent with section 332(c)(3)(A), Congress amended section 2(b) to exclude intrastate CMRS rates and entry from the communications services reserved to state jurisdiction. 47 U.S.C. § 152(b). See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997), rev'd on other grounds sub nom., AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[9] In the Matter of Petition of N.Y. State Pub. Serv. Comm'n To Extend Rate Regulation, 10 FCC Rcd 8187, 8190 (¶ 18) (1995).

[10] In the Matter of Petition on Behalf of the State of Haw., 10 FCC Rcd at 7874 (¶ 20).

Although section 332(c)(1)(A) specifies that CMRS providers are to be treated as common carriers subject to Title II, the statute authorizes the Commission by regulation to forbear from applying Title II rate and service regulation to CMRS carriers if certain criteria are satisfied. 47 U.S.C. § 332(c)(1)(A).[11] This reform to the federal regulatory regime went hand-in-hand with section 332(c)(3)(A), which denies the states jurisdiction over CMRS rates and entry and reflects Congress's recognition that "[s]tate regulation can be a barrier to the development of competition."[12]

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[11] The Commission may exercise its forbearance authority if it determines that: (1) enforcement of the requirement is unnecessary to ensure that rates are just, reasonable, and non-discriminatory; (2) the requirement is not needed to protect consumers; and (3) forbearance is consistent with the public interest. 47 U.S.C. § 332(c)(1)(A). The Commission also must consider whether any proposed regulation forbearing from the enforcement of Title II constraints "will enhance competition among [CMRS] providers . . . ." 47 U.S.C. § 332(c)(1)(C). Section 332(c)(1)(A) does not authorize the FCC to forbear from applying the requirements of sections 201, 202 and 208 to CMRS carriers. See 47 U.S.C. §§ 201(b), 202(a), 208. In 1996, however, Congress enacted a broader forbearance provision, applicable to all telecommunications carriers and services, that authorizes the agency to forbear from applying those and other provisions. 47 U.S.C. § 160. The FCC has observed that the 1996 forbearance provision "gives the Commission the authority to forbear from enforcing sections 201 and 202" to CMRS providers, although the agency has not exercised that statutory authority. See Personal Communications Indus. Ass'n's Petition for Forbearance for Broadband Personal Communications Servs., 13 FCC Rcd 16857, 16865 (¶ 15) (1998), recon. denied, 14 FCC Rcd 16340 (1999).

[12] In the Matter of Petition on Behalf of the State of Conn., 10 FCC Rcd at 7034 n.44, citing H.R. Conf. Rep. No. 103-213, 103 Cong., 1st. Sess., 480-81 (1993).

Consistent with the deregulatory mandate of OBRA, the Commission has exercised its section 332(c)(1)(A) forbearance authority to bar CMRS carriers from filing interstate tariffs that otherwise would be required under section 203.[13] The Commission determined that eliminating tariff regulation of CMRS rates "will foster competition which will expand the consumer benefits of a competitive marketplace."[14] In particular, the Commission found that detariffing "enable[s] CMRS providers to respond quickly to competitors' price changes" and motivates carriers to "win customers by offering the best, most economic service packages."[15] In order to "ensur[e] that unwarranted regulatory burdens are not imposed upon any [CMRS provider],"[16] the Commission likewise has denied state requests, filed pursuant to section 332(c)(3)(A), seeking permission to regulate

[13] 47 C.F.R. § 20.15(c); CMRS Second Report and Order, 9 FCC Rcd at 1480 (¶ 179). See Wireless Consumers Alliance, Inc., 15 FCC Rcd 17021, 17031 (¶ 18) (2000), recon. denied, 16 FCC Rcd 5618 (2001).

[14] 9 FCC Rcd at 1479 (¶ 177). See Orloff v. FCC, 352 F.3d 415, 418 (D.C. Cir. 2003, cert. denied, 124 S.Ct. 2907 (2004)).

[15] Id.

[16] Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d at 845, quoting CMRS Second Report and Order, 9 FCC Rcd at 1418 (¶ 15).

CMRS rates and entry where the state has failed to demonstrate that market forces are inadequate to protect state customers.[17]

As a result of these policies, the rate relationship between CMRS providers and their customers generally is governed "by the mechanisms of a competitive marketplace," [18] in which prospective rates and terms of service are established by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators. In this largely deregulated regime, the Commission in substantial part "rel[ies] on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination."[19] Likewise, the Commission permits state regulation of CMRS rates only if a state has satisfied the stringent section 332(c)(3)(A) standard to justify such regulation.[20]

2. The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition

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[17] See, e.g., In the Matter of Petition on Behalf of the State of Haw., 10 FCC Rcd 7872; Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Servs., 10 FCC Rcd 7842 (1995), recon. denied, 10 FCC Rcd 12427 (1995); Petition of the People of the State of Cal. and the Pub. Utils. Comm'n of the State of Cal., 10 FCC Rcd 7486 (1995).

[18] Wireless Consumers Alliance, Inc., 15 FCC Rcd at 17032-33 (¶¶ 20-21).

[19] 15 FCC Rcd at 17033 (¶ 21).

[20] See CMRS Second Report and Order, 9 FCC Rcd at 1421 (¶ 23).

to flourish, with substantial benefits to consumers. Subscribership continues to increase at a rapid and steady rate. During 2003, for example, the mobile telephone sector increased its subscribership from 141.8 million to 160.6 million, producing a nationwide penetration rate of roughly 54 percent.[21] Intense price competition has resulted in affordable rates as well as innovative pricing plans such as free night and weekend minutes and free mobile-to-mobile calling.[22] Wireless carriers' average revenue per minute has fallen consistently, from 44 cents per minute in 1993 to 10 cents per minute in 2003.[23] Consumers continue to increase the use of their wireless phones. The average minutes-of-use per subscriber per month ("MOUs") in 2003 was 599 minutes, an increase of 100 MOUs from a year earlier.[24]

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[21] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Servs., FCC 04-216 (released Sept. 28, 2004), 2004 WL 2173485, at ¶ 5 ("Ninth Annual CMRS Competition Report").

[22] Mobile voice calls are far less expensive on a per minute basis in the United States than in Western Europe, and at least some indicators show that rates are still decreasing. According to the U.S. Department of Labor's Bureau of Labor Statistics, for example, the price of residential mobile telephone service declined by 1.0 percent during 2003 while the overall consumer price index increased by 2.3 percent. Ninth Annual CMRS Competition Report, at ¶¶ 5, 170.

[23] Id. at A-11, Table 9.

[24] Id.

Consumer choice has expanded as CMRS customers can choose among multiple providers as well as a wide array of service and equipment options.[25] As of September 2004, approximately 276 million people, or 97 percent of the total United States population, lived in counties with access to three or more different carriers offering mobile telephone service. More than 250 million people, or 88 percent of the total United States population, lived in counties with five or more competing mobile telephone service providers.[26]

To succeed in the marketplace, CMRS carriers typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis. Several nationwide CMRS operators have networks covering at least 200 million people.[27] While flat-rate nationwide calling plans were unknown before 1998, today all of the nationwide CMRS operators have responded to competitive pressures by offering some form of national pricing plan that allows customers to purchase a bucket of MOUs to use wherever they are, without incurring roaming or long distance charges.[28]

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[25] See id. at ¶ 4.

[26] Id. at ¶¶ 2, 21.

[27] Id. at ¶ 36.

[28] Id. at ¶ 113.

B. This Proceeding

1. On May 29, 2004, the governor of Minnesota signed into law the Wireless Consumer Protection Act, Art. 5, 2004 Minn. Sess. Law Serv. 261 (West) ("Article 5"). The statute, inter alia, limits "substantive changes" in existing CMRS service contracts. Article 5 defines a "substantive change" solely in terms of price increases and term extensions, i.e., a change "that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." Art. 5, § 1, subd. 1(d). "A price increase that includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer," however, is not a "substantial change" under Article 5. Id.

Article 5 requires a CMRS provider to give its customers 60 days prior written notice of any proposed substantive change. Even after the 60-day waiting period, that change cannot go into effect unless "the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date." Id. If the customer does not opt in, "the original contract terms apply." Id.

Article 5 also provides that a CMRS carrier, upon receiving a proposed customer-initiated change in a contract, must "clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change." Id., subd. 4. The customer's

proposed change does not become effective unless the CMRS carrier agrees to the change and the customer agrees to any resulting changes in the contract. Id.[29]

2. On June 16, 2004, a group of CMRS carriers filed suit in federal district court challenging the lawfulness of Article 5 and seeking to enjoin its enforcement.[30] The CMRS carriers contended, in pertinent part, that Article 5 effectively precludes wireless carriers from making any "substantive change" to the terms of existing contracts that could result in increased prices and thus contravenes the prohibition of state rate regulation contained in section 332(c)(3)(A). The CMRS carriers also argued that Article 5 conflicts with section 54.712(a) of the Commission's rules, 47 C.F.R. § 54.712(a), by prohibiting CMRS carriers from passing through to their customers increases in their federal Universal Service Fund ("USF") contributions.[31]

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[29] Article 5 also requires a CMRS provider (1) to supply each customer, within 15 days of the date on which the service contract is entered, a written copy of that contract or, if requested by the customer, an electronic copy of the contract and (2) to "maintain verification that the customer accepted the terms of the contract for the duration of the contract period." Id., Subd. 2.

[30] "Verizon Wireless's Motion for Temporary Restraining Order," filed June 16, 2004) (J.A. 111); "Complaint for Declaratory and Injunctive Relief," filed June 16, 2004) (J.A. 45).

[31] The USF is a fund composed of regulatory fees that are assessed upon telecommunications carriers providing interstate telecommunications services to ensure that local telephone service remains affordable. See 47 C.F.R. § 69.116; Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 553-56 (8th Cir. 1998).

On June 29, 2004, the district court entered a temporary restraining order enjoining the enforcement of Article 5. Temporary Restraining Order, entered June 29, 2004) ("TRO Order") (J.A. 283). The district court ruled in entering the TRO that the CMRS providers had shown "an initial likelihood of success on the merits" of their claim that Article 5 was state rate regulation proscribed by section 332(c)(3)(A). Id. at 7 (J.A. 289). The district court pointed out that "Article 5 is not a 'generally applicable' consumer protection law" because "it is directed only at providers of cellular services" and is "clearly aimed, in part, at rates." Id. at 6-7 (J.A. 288-89). The court also found that Article 5, by exempting from its notice and opt-in policy only those fees that the government "requires" CMRS providers to collect from their consumers, appears to conflict with section 54.712(a) of the Commission's rules, 47 C.F.R. § 54.712(a). Id. at 7 (J.A. 289). Section 54.712(a) expressly permits CMRS carriers to recover the costs of such contributions from their customers. See 47 C.F.R. § 54.712(a); Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 553 (8th Cir. 1998). The court explained that section 54.712(a) authorizes (but does not require) CMRS carriers to recoup USF fees by recovering them directly from end-user customers. Because Article 5 does not permit the recovery of fees that carriers are merely authorized to recover, the court held, "the plain language of Article 5 seems to prevent" such recovery and thus to conflict with the FCC's regulations. TRO Order at 7 (J.A. 289).

On September 3, 2004, after additional briefing, the district court dissolved its temporary restraining order and denied in substantial part the preliminary injunction the CMRS carriers had requested. Preliminary Injunction Order, entered Sept. 3, 2004, 2004 WL 2065807 (J.A. 526). While reiterating that Article 5 "certainly implicates rates" and "is directed at wireless providers," the district court stated that it was "no longer convinced that the law presents impermissible rate regulation." Id. at 8-9 (J.A. 533-34). Instead, the district court concluded that Article 5 "manifests basic principles of contract law" by requiring CMRS carriers "to disclose rates, to obtain consent to rate increases, and to honor contractual obligations." Id. The district court denied that Article 5 "caps wireless rates," and it upheld Article 5 as a consumer protection law that regulates terms and conditions other than rates. Id. at 3, 7 (J.A. 528, 532).

The district court adhered to its earlier ruling that Article 5 conflicts with section 54.712(a) of the Commission's rules by preventing CMRS carriers from recovering USF fees directly from their end-users. Id. Accordingly, the district court enjoined enforcement of Article 5 only to the extent that it prohibits the recovery of federal fees permitted (but not required) to be passed-through to end users.

On September 15, 2004, the CMRS carriers filed with this Court a motion for a stay of the district court's Preliminary Injunction Order. This Court granted

that motion on October 14, 2004, thus staying enforcement of Article 5 pending final disposition of this case.

STANDARD OF REVIEW

Because the Commission is charged with administering section 332(c)(3)(A), the Court should construe that provision in light of Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under Chevron, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." Id. at 843 n.9, 842. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. But when the statute is silent or ambiguous with respect to a specific issue that the administering agency has addressed, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. Under those circumstances, the reviewing court must defer to the expert agency's interpretation if it is reasonable. E.g., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

The principles of Chevron deference apply even in cases, such as this one, that are beyond the context of direct review of an agency order. See Teambank v. McClure, 279 F.3d 614, 618-619 (8th Cir. 2002) (affording Chevron deference, in case between bank and state regulators, to statutory interpretation of the Comptroller of the Currency). Such deference, moreover, is accorded to

interpretations announced in agency adjudications, as well as notice-and-comment rulemakings. United States v. Mead Corp., 533 U.S. 218, 229 (2001); see Fedor v. Cingular Wireless Corp., 355 F.3d 1069, 1073 (7th Cir. 2004) (affording deference to FCC adjudications interpreting section 332(c)(3)(A) and citing Chevron).

ARGUMENT

ARTICLE 5 IS STATE REGULATION OF CMRS RATES BARRED BY SECTION 332(c)(3)(A).

1. Unless a state obtains prior authorization from the Commission – which Minnesota has not done – section 332(c)(3)(A) denies the state "any authority to regulate . . . the rates charged by any commercial mobile service . . . ." 47 U.S.C. § 332(c)(3)(A). See Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983, 987 (7th Cir. 2000) ("Congress intended complete preemption" of CMRS rates and entry in section 332(c)(3)(A)). The Commission has interpreted the scope of section 332(c)(3)(A) preemption broadly to include "both rate levels and rate structures for CMRS." In re Southwestern Bell Mobile Sys., Inc., 14 FCC Rcd 19898, 19908 (¶ 20) (1999). The Commission held in that case that section 332(c)(3)(A) bars state prohibitions on charges for incoming calls or charging in whole minute increments, explaining that "states not only may not prescribe how much may be charged for [CMRS] services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers." Id. By enacting Article 5 without Commission

authorization, Minnesota has sought to regulate directly the level of the rates that CMRS carriers may charge their customers, as well as the carriers' rate structures. Article 5 thus violates, and is preempted by, section 332(c)(3)(A).

Article 5 imposes a 60-day freeze on the implementation of virtually all rate increases proposed by CMRS carriers in Minnesota, which directly undercuts the federal policy of detariffing CMRS.[32] Under tariff regulation, a carrier generally may not make its proposed rate changes immediately effective, which allows regulators to evaluate the lawfulness of the change before it goes into effect. See, e.g., 47 U.S.C. § 203(b)(1). The Commission's detariffing of CMRS reflects an attempt to eliminate such regulatory constraints, and to enhance competition in the CMRS marketplace by permitting carriers to respond quickly to competitors' price changes without a required waiting period.[33] Minnesota's 60-day moratorium on any changes that "could result in an increase in the charge to the customer," Art. 5, § 1, subd. 1(d), undermines that federal policy.

Article 5, moreover, imposes state-based restrictions on an industry that increasingly prices, markets, and provides its services on a nationwide basis. To comply with the potentially inconsistent rate requirements of Minnesota and other

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[32] The only exemption is where a price increase involves only an increase in taxes and fees that the CMRS provider is required to pass through to its customer. Art. 5, § 1 sub. 1(d).

[33] CMRS Second Report and Order, 9 FCC Rcd at 1497 (¶ 177).

states that follow Minnesota's example, CMRS providers might be required to withdraw or revise their nationwide service offerings. For instance, carriers might conclude that the only practicable way to ensure compliance with Minnesota's 60-day freeze is to impose the same delay for all customers who have chosen a nationwide rate plan. (That possibility is particularly apparent given the uncertainty surrounding the reach of Article 5. See Appellants' Br. 38-39.) In this way, state rate regulation like Article 5 may effectively trump the deregulatory federal regime beyond – as well as within – the borders of the particular state.

The 60-day freeze required by Article 5 applies even if the CMRS contract itself permits an earlier implementation of the rate increase, or the customer affirmatively consents to an earlier effective date. Contrary to the holding of the district court, Article 5 does "cap[] rates," at least for that 60-day notice period. See Preliminary Injunction, at 9 (J.A. 534).[34] For that time period Article 5 prescribes the original contract rate as the state-mandated ceiling.

In Wireless Consumers Alliance, Inc., 15 FCC Rcd 17021, the Commission considered whether section 332(c)(3)(A) preempts damage awards against CMRS

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[34] Indeed, for most rate increases the freeze likely will extend past the 60-day notice period because the CMRS carrier is barred from increasing rates during the contract term without the customer's affirmative consent. Most customers will not opt-in to a standalone request from a CMRS carrier for a rate increase, although it is possible that a rational customer would consent to an increase that is part of a package that provides, for example, an increase in minutes or an enhancement of service.

providers based on state court tort or contract claims. While the Commission determined that such state claims generally are not preempted, the agency found that they are barred by section 332(c)(3)(A) if, inter alia, the court in determining damages for state law violations "sets a prospective charge for services." 15 FCC Rcd at 17021 (¶ 39); accord AT&T Corp. v. FCC, 349 F.3d 692, 701 (D.C. Cir. 2003) (noting parties' agreement that under section 332(c)(3)(A) "state courts may not determine the reasonableness of a prior rate or set a prospective charge for service"). Similarly here, by effectively capping existing CMRS rates for at least a 60-day period, Article 5 in effect "sets the [maximum] prospective [CMRS] charge" – an activity prohibited to states under section 332(c)(3)(A).

Even after expiration of the 60-day rate moratorium, Article 5 forbids a carrier to make a rate increase effective in an existing contract without the affirmative consent of the CMRS customer. The Minnesota statute thus mandates a particular consent procedure for CMRS rate increases, even if the CMRS contract itself would permit the rate increase under a different procedure (or no consent procedure at all). Under Article 5, Minnesota law supercedes the CMRS contract so as to further delay or preclude CMRS rate increases. That also is state rate regulation.

2. Article 5 does not fall within the exemption in section 332(c)(3)(A) for state regulation of terms and conditions "other" than CMRS rates and entry. 47

U.S.C. § 332(c)(3)(A). See Fedor v. Cingular Wireless Corp., 355 F.3d 1069. The Commission has recognized that this exemption preserves state regulation that requires the disclosure of wireless rates and billing practices. See Southwestern Bell Mobile Sys., Inc., 14 FCC Rcd at 19908 (¶ 23). Article 5, however, does more than require such disclosure. Article 5 controls when and under what conditions a carrier may raise its prices, which is impermissible under section 332(c)(3)(A).

The Commission has further determined that section 332(c)(3)(A) does not preempt the "neutral application of state contractual or consumer fraud laws." Southwestern Bell Mobile Sys., , 14 FCC Rcd at 19903 (¶ 10). See Wireless Consumers Alliance Inc., 15 FCC Rcd at 17025 (¶ 8); In the Matter of Petition of the State Indep. Alliance, 17 FCC Rcd 14802, 19821 n.119 (2002). Article 5 cannot fairly be characterized as a generally applicable law of that sort. The statute addresses only CMRS service, and the statutory restrictions are limited in scope to changes that "could result in an increase to the charge to the customer." Art. 5, § 1 subd. 1(d). Because the statutory restrictions apply only to rate increases in CMRS contracts, these restrictions "fall . . . more heavily on CMRS providers than on any other business." Wireless Consumers Alliance Inc., 15 FCC Rcd at 17034 (¶ 24). Article 5 thus is outside the scope of consumer fraud or contract laws of general application.

Finally, the Commission determined in Wireless Consumers Alliance that state damages awards were not necessarily the equivalent of rate regulation, because those awards had only an "uncertain" and "indirect" effect on CMRS prices. 15 FCC at 17041 (¶ 38). This interpretation also does not support Article 5. Article 5 cannot be characterized as "incidental" to rate regulation, id., because it directly proscribes CMRS carriers from increasing rates unless they comply with the specific requirements set forth in the statute. Article 5 falls squarely within the ban on state rate regulation in section 332(c)(3)(A).

CONCLUSION

The judgment of the district court should be reversed.

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November 12, 2004

IN THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS, ET AL.,	)	
APPELLANTS,	)	
V.	)	NO. 04-3198
MIKE HATCH,	)	
APPELLEE.	)	

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Federal Communications Commission certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) in that it contains 5123 words, excluding Table of Contents, Table of Authorities, Certificates, and Addendum, and is printed in an proportionately spaced typeface, 14-point Times New Roman, utilizing Microsoft Word 2000.

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CERTIFICATION OF VIRUS-FREE DISKETTE

Pursuant to 8th Cir. R. 28A(d), the undersigned counsel certifies that the enclosed computer diskette containing the brief of the Federal Communications Commission has been scanned for computer viruses and is virus-free.

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